



**IN THE
Supreme Court of the United States**

October Term, 1978

No. **78-1596**

GILBERTO LOPEZ,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION FIRST DEPARTMENT**

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gilberto Lopez prays that a writ of certiorari issue to review a judgment of the Appellate Division of the Supreme Court of the State of New York, entered January 4, 1979 affirming a judgment of conviction rendered against petitioner in the Supreme Court of the State of New York, Bronx County, convicting petitioner of the crime of murder in the second degree.

OPINION BELOW

On January 4, 1979 the Supreme Court of the State of New York, Appellate Division, First Department, affirmed the judgment of conviction in the attached opinion (see Appendix 2A, 3A). On February 5, 1979 leave to appeal to the Court of Appeals of the State of New York was denied. (See Appendix 4A).

JURISDICTION

The judgment and order of the Supreme Court of the State of New York, Appellate Division, First Department is dated January 4, 1979. Jurisdiction of this Court is invoked, made and conferred under Title 18 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Was prosecutorial misconduct pervasive throughout the trial so gross as to deprive petitioner of his right to a fair trial?
2. Were the Court's rulings during the trial and charge to the jury so fundamentally in error as to violate petitioner's due process rights?

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5th Amendment:

"... nor be deprived of life, liberty or property without due process of law."

14th Amendment:

"... no state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; . . ."

STATEMENT OF THE CASE

An argument over a \$5.00 loan advanced by petitioner to the deceased resulted in a fight that ended with the borrower, the deceased, being shot. Petitioner testified that the deceased was shot by his own weapon during a struggle that pitted the deceased, a larger, heavier and younger man, and the deceased's friends against petitioner, a slight man who had lost the use of his left arm when in his youth he had been hit by a stray bullet at a baseball game. Petitioner, fearful for his and his daughter's lives, tried to prevent the deceased from drawing his revolver from his belt and while the deceased and petitioner were struggling the gun accidentally discharged. Petitioner was immediately set upon by the deceased's friends but managed to escape with his daughter while receiving severe blows. Petitioner returned home with his daughter and waited for the police in a neighbor's apartment. At the police station petitioner related these events

to a detective and later to an Assistant District Attorney from the Bronx District Attorney's office.

Petitioner's testimony was corroborated by defense witness Vincent Reyes, who was accused by the prosecution of having received payment for his testimony from the petitioner and his attorney. These accusations made before the jury were without basis and asked in bad faith as were also the questions put to Mr. Reyes concerning his prior criminal record. Mr. Reyes was asked whether he had murdered, robbed, burglarized, etc.

In another breach of prosecutorial propriety, petitioner's character witness was asked to assume the facts of the case as presented by the prosecution witness—that petitioner shot the deceased in cold blood—in assessing petitioner's character.

Two prosecution witnesses testified that they witnessed the fight between petitioner and the deceased in a grocery store earlier that evening. Petitioner was driven home and returned later that evening to the social club next door where he approached deceased and shot him and then left unmolested. Other prosecution witnesses testified to seeing petitioner leave the club.

I

Prosecutorial misconduct pervasive throughout the trial was so gross as to deprive Petitioner of his right to a fair trial.

Most heinous was the prosecutor's questions of defense witness about being paid for his testimony:

"Q. And [Mr. Sokol] gave you money one of those times, didn't he?

A. No.

* * *

Q. Did [Mrs. Lopez] give you money?

A. No."

Absolutely nothing contained in the record or anything conveyed by Mr. Sokol, trial attorney for the petitioner, or the petitioner had a basis for making this outrageous accusation.

Equally improper was the prosecution's constant reference to petitioner and the defense witness "lying" and contrasting their mendacious conduct to the prosecutor's "honest" witnesses. With respect to the defense eyewitness Vincent Reyes, the prosecution engaged in abusive and sarcastic cross-examination concerning the witness' prior criminal record asking whether he had been convicted of crimes that the prosecutor knew that this witness had not even been charged as attested by the arrest record the prosecution had. In addition, the prosecution demeaned petitioner's severe injury to his left arm, his wife's conduct and defense counsel by stating that defense counsel was deliberately misstating the facts. Further, the prosecutor imposed himself as the 13th juror, by stating "we must believe;" made a thinly veiled appeal to the racial prejudice of the jury by arguing, "the type of defense we are going to hear" and concluded his summation with a call for vengeance. The prosecution accused petitioner of not telling the entire story to the authorities. *Doyle v. Ohio*, 426 U.S. 610. And during the trial, disregarded the court's ruling as to questioning a prosecution witness as to when his friendship with petitioner ended and the answer was when petitioner shot the deceased.

When cross-examining the petitioner's character witness the prosecutor posed questions assuming the facts of the case on trial as presented by a prosecution witnesses asking him if his opinion would change if he knew *that the petitioner had killed the deceased in "cold blood."* (Emphasis supplied).

In *Michelson v. U.S.*, 335 U.S. 469, this Court held that cross-examination of character witnesses must be closely controlled by the trial court in accordance with commonlaw rules of evidence. This commonlaw rule of evidence that a character witness not be questioned concerning his personal opinion of the character of an accused but solely on his knowledge of the

accused's reputation in the community. Asking the character witness to assume petitioner's guilt of the crime, the question reserved for the jury, was so fundamentally prejudicial as to deprive petitioner of a fair trial.

As this Court stated in *Berger v. U.S.*, 295 U.S. 78, 89:

"We have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with the probable cumulative effect upon the trial which cannot be disregarded as inconsequential."

See also *Taylor v. Kentucky*, *infra*.

II

This Court has held that a person accused of a crime is entitled to have his guilt or innocence determined solely on the basis of evidence introduced at trial and not on the incidental but extraneous circumstances such as the returning by the Grand Jury of an Indictment. *Estelle v. Williams*, 425 U.S. 501. I was fundamental error of constitutional dimensions to charge the jury in this case:

"Since the indictment itself is the best evidence of the charges against the defendant, I will read each charge as it is written in the indictment."

This instruction given by the trial court offends a principle so rooted in tradition—an indictment is not proof of the crimes charged in such indictment—that conviction of an accused on the basis of such charge must be deemed to be a deprivation of due process. *Patterson v. New York*, 432 U.S. 197. The charge to the jury that an indictment is the "best evidence of the charges" would permit a jury to convict on less than proof beyond a reasonable doubt. Likewise, the trial court's charge that the jury could find guilt where it has "a feeling an accused might not be guilty" dilutes the concept of reasonable doubt and presumption of innocence fundamental to our system of

laws. *In Re Winship*, 397 U.S. 358. A lawyer might understand that the Court misspoke. However, an ordinary citizen taking the law from the Court, as it must, would conclude that the indictment was proof of the charges and that if a jury believed petitioner to be not guilty conviction was still required. *Taylor v. Kentucky*, 436 U.S. 478.

CONCLUSION

This Court should grant petitioner's request for a writ of certiorari and entertain briefs and arguments on the merits.

Respectfully submitted,

MANUEL NELSON ZAPATA
*Member of the Bar of the
United States Supreme Court*

APPENDIX A—ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT

At a term of the Appellate Division
of the Supreme Court held in and
for the First Judicial Department in
the County of New York, on 4th
day of January 1979

Present—Hon. Vincent A. Lupiano, Justice Presiding
Samuel J. Silverman
Arnold L. Fein
Leonard H. Sandler
Joseph P. Sullivan, Justices.

The People of the State of New York,
Respondent,

-against-

Gilberto Lopez,
Defendant-Appellant.

Order of Affirmance on Appeal from Judgment
4241

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Grey, J.), rendered on November 10, 1977, convicting defendant, after a jury trial, of murder in the second degree, and said appeal having been argued by Mr. Manuel Nelson Zapata of counsel for the appellant, and by Mr. Leonard G. Kamlet of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER: JOSEPH J. LUCCHI
Clerk.

Counsel for appellant is referred to
§606.5, Rules of the Appellate
Division, First Department

APPENDIX B—DECISION

Lupiano, J.P., Silverman, Fein, Sandler, Sullivan, JJ.
4241

The People of the State of New York,

Respondent,
L.G. Kamlet

-against-

Gilberto Lopez,
Defendant-Appellant.
M.N. Zapata

Judgment, Supreme Court, Bronx County (Grey, J.), rendered November 10, 1977, sentencing defendant to imprisonment for 15 years to life, after conviction of defendant by a jury, of murder in the second degree, is unanimously affirmed.

Considering the case as a whole, and the strength of the evidence against the defendant, we do not think a reversal is warranted.

However, we take this opportunity to state the following cautions:

We disapprove of the district attorney's repeated use of the word "lie" in commenting on the defense testimony. The use of invective is particularly inappropriate by a representative of the

district attorney in addressing a jury; it militates against the calm atmosphere in which judicial proceedings should be conducted. There are other ways of telling the jury that evidence is wilfully false without the use of fighting words.

The district attorney also should not have asked defendant's character witness whether he would change his opinion of defendant's character if he heard that defendant had committed a cold-blooded murder, obviously referring to the case on trial. The question improperly assumed that the defendant was guilty of the crime with which he was charged, the very issue toward the determination of which the character evidence was offered.

Order filed.

APPENDIX C—CERTIFICATE DENYING LEAVE

**STATE OF NEW YORK
COURT OF APPEALS**

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

GILBERTO LOPEZ

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Insufficient ground indicated for an oral hearing of this application.

Dated at New York, New York
February 5, 1979

s/ Jacob D. Fuchsberg
Associate Judge

*Description of Order: Order of the Appellate Division First Department dated January 4, 1979 affirming judgment of the Supreme Court, Bronx County rendered on November 10, 1977.